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RECEIVED

JUN 24 2011

MARIAN W. PAYSON
U.S. Magistrate Judge
Western District of New York

World Trade Center East

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June 24, 2011

By Facsimile and First Class U.S. Mail

Magistrate Judge Marian W. Payson
U.S. District Court
for the Western District of New York
2120 U.S. Courthouse, 100 State Street
Rochester, NY 14614

Re: *Tracy, et al. v. NVR, Inc.*, Civil Action No: 04-CV-06541 DGL(P)

Dear Judge Payson:


We write to request a one-week extension of the briefing schedule on Plaintiffs' currently pending Motion to Compel (Dkt. 579). Due to vacation schedules of counsel and other scheduling pressures, NVR requires a brief extension of time in which to file its opposition to Plaintiffs' motion. NVR requests that the Motion Scheduling Order (Dkt 583) be extended to permit NVR to file an opposition to Plaintiffs' motion on or before July 8, 2011, and to allow Plaintiffs to file a reply in further support of their motion on or before July 22, 2011. This modified schedule would provide the Court with more than two weeks in which to review the parties' submissions prior to the hearing on Plaintiffs' motion, presently scheduled for August 9, 2011.

NVR sought Plaintiffs' counsel's assent to this request yesterday morning. Plaintiffs' counsel responded by demanding concessions on an unrelated issue in exchange for their assent to NVR's requested extension. Though NVR has provided the demanded concessions, Plaintiffs' counsel continues to decline to take a clear position on NVR's request. While NVR is not certain of Plaintiffs' position, based on Plaintiffs' counsel's messages, NVR is left to infer that Plaintiffs do not oppose NVR's request. The salient correspondence between the parties on this subject is attached.

Should NVR's request meet with the Court's approval, a "So Ordered" line is provided below for the Court's convenience. Thank you for your courtesies in this matter.

Respectfully Submitted,

SEYFARTH SHAW LLP


Barry J. Miller

cc: Peter J. Glennon, Esq. (by e-mail)

Request granted.

SO ORDERED: Marian W. Payson
Marian W. Payson, U.S. Magistrate Judge

Dated: June 24, 2011

Miller, Barry

From: Miller, Barry
Sent: Thursday, June 23, 2011 10:14 AM
To: Peter Glennon
Cc: Hlawek, James; Fleming, Dana; 'Bauer, William G.'
Subject: Tracy v. NVR - Motion to Compel

Peter,

Due to vacation schedules and a medical issue with a member of our team, we are writing to request Plaintiffs' assent to a brief extension of time in which to file an opposition to Plaintiffs' most recent Motion to Compel (Dkt 579). We propose a one-week extension, such that NVR's opposition would be due on July 8, and Plaintiffs' reply would be due on July 22. This would still give Judge Payson more than two weeks in which to review the papers before the August 9 hearing date. Please let us know if you will agree to this request.

Regards,

Barry J. Miller
Seyfarth Shaw LLP
2 Seaport Lane, Suite 300
Boston, MA 02210
direct dial: (617) 946-4806
direct fax: (617) 790-6753

Miller, Barry

From: Peter J. Glennon [pglennon@theemploymentattorneys.com]
Sent: Thursday, June 23, 2011 2:19 PM
To: Miller, Barry
Cc: Fleming, Dana; Hlawek, James; Bauer, William G.; Laura A. Myers; Jayme Feldman
Subject: Re: Tracy v. NVR - Motion to Compel

Barry,

We understand the need for all parties to request brief extensions from time-to-time. We tend to consent to such requests with the understanding that the other side reciprocates the courtesy in the future. However, here your request implicates other concerns: namely July deposition dates for Tammy McCutchen.

You mention your team's medical issue and vacation schedules, which raises the question of when you or one of your team members might be available in July for Ms. McCutchen's deposition in Washington DC. Accordingly, before plaintiffs assent to your request, we ask that you identify July dates when a member of your team is available for Ms. McCutchen's deposition.

Best,
Peter.

Peter J. Glennon, Esq.
Thomas & Solomon LLP
585-272-0540
pglennon@theemploymentattorneys.com
www.theemploymentattorneys.com

On Jun 23, 2011 10:13 AM, "Miller, Barry" <BMiller@seyfarth.com> wrote;

6/24/2011

Miller, Barry

From: Miller, Barry
Sent: Thursday, June 23, 2011 3:17 PM
To: 'Peter J. Glennon'
Cc: Fleming, Dana; Hlawek, James; Bauer, William G.; Laura A. Myers; Jayme Feldman
Subject: RE: Tracy v. NVR - Motion to Compel

Peter,

We fail to see a connection between the scheduling of a deposition on the topic as to which Judge Payson has permitted Plaintiffs to seek information from Ms. McCutchen and the briefing of Plaintiffs' most recent Motion to Compel. There is no overlap in subject matter between those two events.

Also, as you are aware, NVR and Ms. McCutchen have asked for the Court's guidance as to whether Plaintiffs' inquiry of Ms. McCutchen should proceed (at least initially) by interrogatory rather than deposition. While we understand that you have a different perspective than we do on that substantive issue, we believe it is premature to select dates for a deposition while the issue is in Judge Payson's hands.

Setting aside for present purposes the two points above, we are not in a position to provide availability information for Ms. McCutchen and her counsel. However, with reasonable advance notice, we do not presently anticipate that our vacation schedules or other considerations would preclude NVR's counsel from appearing for a deposition of Ms. McCutchen during the weeks of July 18 or 25, if the Court were to so direct.

Please let us know if you will assent to our requested extension of the briefing schedule on Plaintiffs' Motion to Compel. If we do not hear from you by 5:00 p.m., we will submit our request along with the parties' exchange of messages on the subject of Plaintiffs' assent to Judge Payson.

Regards,

Barry J. Miller
Seyfarth Shaw LLP
2 Seaport Lane, Suite 300
Boston, MA 02210
direct dial: (617) 946-4806
direct fax: (617) 790-6753

From: Peter J. Glennon [mailto:pjglennon@theemploymentattorneys.com]
Sent: Thursday, June 23, 2011 2:19 PM
To: Miller, Barry
Cc: Fleming, Dana; Hlawek, James; Bauer, William G.; Laura A. Myers; Jayme Feldman
Subject: Re: Tracy v. NVR - Motion to Compel

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You mention your team's medical issue and vacation schedules, which raises the question of when you or one of your team members might be available in July for Ms. McCutchen's

6/24/2011

deposition in Washington DC. Accordingly, before plaintiffs assent to your request, we ask that you identify July dates when a member of your team is available for Ms. McCutchen's deposition.

Best,
Peter.

Peter J. Glennon, Esq.
Thomas & Solomon LLP
585-272-0540
pjglennon@theemploymentattorneys.com
www.theemploymentattorneys.com

On Jun 23, 2011 10:13 AM, "Miller, Barry" <BMiller@seyfarth.com> wrote:

Miller, Barry

From: Peter Glennon [pglennon@theemploymentattorneys.com]**Sent:** Thursday, June 23, 2011 5:17 PM**To:** Miller, Barry**Subject:** RE: Tracy v NVR: McCutchen

Barry – Is there a reason why you need to inform her of anything tonight? We're likely to consent, but we do want to lock down this date. We should be able to button this up by tomorrow, at which time you can inform Judge Payson.

I'm stepping out to a dinner event right now, but I'm sure that we can be done with this by tomorrow.

Thomas & Solomon LLP
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From: Miller, Barry [mailto:BMiller@seyfarth.com]**Sent:** Thursday, June 23, 2011 5:09 PM**To:** Peter Glennon**Subject:** RE: Tracy v NVR: McCutchen

While we're waiting to hear from Joe, can I apprise Judge Payson that you assent to our request for an extension of the briefing schedule on Plaintiffs' Motion to Compel, or shall I let her know that we asked and you declined to take a position until a tentative date for Ms. McCutchen's deposition was arranged?

From: Peter Glennon [mailto:pglennon@theemploymentattorneys.com]**Sent:** Thursday, June 23, 2011 4:59 PM**To:** Miller, Barry; Harkins, Joseph P.**Cc:** Jayme Feldman; Laura Myers; Fleming, Dana; Hlawek, James; wbauer@woodsaviatt.com**Subject:** RE: Tracy v NVR: McCutchen

Joe – can July 28 work for you?

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From: Miller, Barry [mailto:BMiller@seyfarth.com]
Sent: Thursday, June 23, 2011 4:46 PM
To: Peter Glennon; Harkins, Joseph P.
Cc: Jayme Feldman; Laura Myers; Fleming, Dana; Hlawek, James; wbauer@woodsoviatt.com
Subject: RE: Tracy v NVR; McCutchen

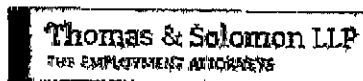
I could do the 28th but could not start at 10am. I would have to check the flight schedule before we locked it in, but based on prior experience with the Boston to DC shuttle, I suggest that we tentatively hold the date for a deposition to commence at 2:30pm. As before, this would be conditional on Joe and Tammy's schedules and on direction from Judge Payson prior to July 15 that a deposition is the appropriate way to proceed.

Barry J. Miller
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direct dial: (617) 946-4806
direct fax: (617) 790-6753

From: Peter Glennon [mailto:pglennon@theemploymentattorneys.com]
Sent: Thursday, June 23, 2011 4:23 PM
To: Harkins, Joseph P.; Miller, Barry
Cc: Jayme Feldman; Laura Myers; Fleming, Dana; Hlawek, James; wbauer@woodsoviatt.com
Subject: RE: Tracy v NVR; McCutchen

Yes, Joe – we're scheduling a date without prejudice to Barry's recent request to Judge Payson.

If July 18 does not work for Ms. McCutchen, then plaintiffs' next best date is Thursday July 28 at 10am (sorry Joe, and we appreciate your offer to move that commitment). Can we all agree to July 28 at 10am?



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From: Harkins, Joseph P. [mailto:JHarkins@littler.com]
Sent: Thursday, June 23, 2011 4:18 PM
To: Miller, Barry; Peter Glennon
Cc: Jayme Feldman; Laura Myers; Fleming, Dana; Hlawek, James; wbauer@woodsoviatt.com
Subject: RE: Tracy v NVR: McCutchen

The 18th is one of our "blackout" dates, but the 19th is not, again with the same conditions on clarification of the deposition versus interrogatory issue. The other date that is not good for us is July 27, which is a Wednesday. I like to avoid Thursday mornings, too, but can move my other commitment in that slot, if need be. To avoid prejudicing the effort to obtain clarification, I assume we are moving toward a tentative date, which could serve for a deposition, if any.

From: Miller, Barry [mailto:BMiller@seyfarth.com]
Sent: Thursday, June 23, 2011 4:05 PM
To: Peter Glennon; Harkins, Joseph P.
Cc: Jayme Feldman; Laura Myers; Fleming, Dana; Hlawek, James; wbauer@woodsoviatt.com
Subject: RE: Tracy v NVR: McCutchen

Given that we have to travel to DC, it would be more convenient for us if any deposition that may go forward started on a Tuesday (or later in the week), rather than first thing on a Monday morning. NVR could agree to attend a deposition on the 19th (assuming it works for Joe and Ms. McCutchen), conditioned on receiving direction from the Magistrate Judge on whether a deposition is appropriate on or before July 8.

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From: Peter Glennon [mailto:pglennon@theemploymentattorneys.com]
Sent: Thursday, June 23, 2011 3:50 PM
To: Harkins, Joseph P.; Miller, Barry
Cc: Jayme Feldman; Laura Myers; Fleming, Dana; Hlawek, James; wbauer@woodsoviatt.com
Subject: RE: Tracy v NVR: McCutchen

Thanks Joe. And I understand that scheduling the deposition is without prejudice to Barry's recent efforts before Magistrate Judge Payson.

With that same understanding, and to avoid future delays in this matter, I think it is best for us to agree now to a specific date and time for Ms. McCutchen's deposition. May we agree to schedule it for Monday July 18 at 9am at Joe's office in Washington DC?

Best,

6/24/2011

Peter.

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From: Harkins, Joseph P. [mailto:JHarkins@littler.com]
Sent: Thursday, June 23, 2011 3:34 PM
To: Peter Glennon; Miller, Barry
Cc: Jayme Feldman; Laura Myers
Subject: RE: Tracy v NVR: McCutchen

Without prejudice to Barry's effort to obtain clarification from the magistrate on the form this discovery should take, I can say that both Tammy and I have dates available during each of those two weeks.

From: Peter Glennon [mailto:pjglennon@theemploymentattorneys.com]
Sent: Thursday, June 23, 2011 3:25 PM
To: Harkins, Joseph P.
Cc: Jayme Feldman; Laura Myers
Subject: Tracy v NVR: McCutchen

Hi Joe,

We are still waiting to receive from you proposed July deposition dates for Ms. McCutchen. NVR's counsel has indicated that they could be available the week of July 18 or the week of July 25 for her deposition in DC. Please inform me of your availability.

As we stated in our recent letter to Judge Payson, if we do not receive proposed dates from you and confirm the deposition date by tomorrow, we will move to compel the Subpoena. Please feel free to call me to discuss.

Best,
Peter.

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Peter J. Glennon, Esq.

6/24/2011

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Littler Mendelson, P.C.
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